IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.S.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

FRIDAY, THE 25TH MAY 2007 / 4TH JYAISHTA 1929

WA. No. 1211 of 2007

AGAINST THE JUDGEMENT IN WPC.14455/2005 Dated 11/04/2007
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APPELLANT: APPELLANT/PETITIONER IN WPC

SAJEEV P.K.,S/O.SRI.N.C.KRISHNAN,
AGED 38 YEARS,UPPER DIVISION CLARK,REGIONAL ARCHIVES,ERNAKULAM,KOCHI-11,RESIDING AT VADASSERIKUNNUPARAMBIL,CHOTTANIKKARA P.O, KANAYANNUR,ERNAKULAM-682 312.

BY ADV. SRI.O.V.RADHAKRISHNAN (SR.)
SMT.K.RADHAMANI AMMA
SRI.ANTONY MUKKATH
SRI.K.V.JOY
SRI.K.RAMACHANDRAN (THYKOODAM)

RESPONDENTS: RESPONDENTS/RESPONDENTS IN WPC
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1. STATE OF KERALA REPRESENTED BY PRINCIPAL SECRETARY TO GOVERNMENT, FINANCE (ESTABLISHMENT-B) DEPARTMENT, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

2. THE KERALA PUBLIC SERVICE COMMISSION RE PRESENTED BY ITS SECRETARY, PATTOM, THIRUVANANTHAPURAM.

3. SHAFIQ AHAMMED C.M,CHERUKARAKAVIL HOUSE,VARANAM P.O,ALAPPUZHA DISTRICT.

4. B.SETHU,S/O.BALAKRISHNA SHARMA, KULAKKUZHI ILLOM,THAKAZHY,KUTTANAD TALUK, ALAPPUZHA DISTRICT.

5. SHIJU JOSE,VELUTHEDATH,PATHIRAPPILLY P.O ALAPPUZHA DISTRICT.

6. G.JEEVAN KUMAR,JEEVAN NIVAS,
KONCHARA P.O,VAMBAYAM,THIRUVANANTHAPURAM DISTRICT.

7. T.CHANDRAKUMAR,'GANGA',NADUVATH,
NEMOM P.O,THIRUVANANTHAPURAM-20.

R1 BY GOVT PLEADER SRI SANDESH RAJ
R2 BY ADV. SRI P.C. SASIDHARAN, STANDING COUNSEL
SRI.V.P.SUKUMAR
SRI.KURYAN THOMAS

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 25/05/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.S. RADHAKRISHNAN & ANTONY DOMINIC, JJ.

Writ Appeal No 1211 of 2007

Dated: 25th May 2007

JUDGMENT

Radhakrishnan, J.

This appeal arises out of the judgment in W.P.C. No 14455 of 2005. Writ petitioner has challenged the validity of G.O. (P) No 123/2005/Fin dated 16.03.2005 contending that the first respondent has no power to fill up the vacancies remaining unfilled in category 1 through direct recruitment. Petitioner has submitted that Government have no power to issue executive order so as to fill up vacancies which arose under category No. 1 to the post of Divisional Accountants.

2. Appointment of Divisional Accountant, a post included as category No. 3 in the Kerala General Service shall be in accordance with the three methods prescribed by the Special Rules issued as per G.O. (P) No 464/Public (Rules)Department/1966 dated 28.11.1966 and published in the Kerala Gazette dated 5.12.1966. Those three methods are: (i) by absorption of existing emergency Divisional

Accountants and on absorption of existing Emergency Divisional Accountants by transfer of Junior Superintendents in the Public Works Department, the Harbour Engineering Department and the Irrigation Department (one third of the vacancies); (ii) by direct recruitment (one third of the vacancies) and (iii) by transfer from among U.D. Clerks of all departments. For the past several years not a single candidate has come out successful in the test conducted by the Public Service Commission from among Junior Superintendents and the vacancies could not be filled up so far on a regular basis under category (i). Government is facing this contingency for quite some time. Efforts were made to amend the Special Rules so as to prescribe alternative methods for appointment for filling up the category of posts in category No. 1 but nothing fruitful could be done. In the several writ petitions it was stated that Government would be taking steps to amend the Special Rules so as to fill up the vacancies under category (i) by appointing candidates under categories (ii) and (iii). Later Government issued Ext P7 executive order, G.O.(P) 123/2005/Fin dated 16.03.2005. Paragraph 5 deals with the case of amendment for appointment to the cadre of Divisional Accountants. It is stated in paragraph 5 as

follows:

> "If the required number of candidates are not available to fill up the vacancies, to be filled up under item (i) or (iii) above, the deficiencies shall be made good by direct recruitment."

On the basis of the above it is stated that Special Rules of KGS and KPWA Code shall be issued separately.

Senior Counsel Sri O.V. Radhakrishnan submitted that in the absence of amendment of the Special Rules Government is not justified in placing reliance on Ext. P7 executive order so as to fill up the vacancies under category (i). Counsel submitted that vacancies available under category (i) should have been equally distributed among other two categories. We find it difficult to accept the contention. We are of the view, it is for the appointing authority to decide in what manner the vacancies available under category (i) be filled up. In order to meet that contingency Government have issued the executive order. It is well settled law that in the absence of statutory provisions it is open to the Government to issue executive order pending finalisation of the Special Rules. Learned single judge has rightly considered all those aspects. We fully endorse the

view of the learned single judge that in the absence of statutory provisions executive orders can be validly issued. Further we notice one-third of the vacancies now ear-marked for category (iii) have not been affected by Ext P7 order. Special Rules never say in what matter the vacancies under category (i) be filled up in the absence of sources mentioned therein. Therefore it is always open to the Government to issue executive order to fill up the vacancies pending amendment of the Special Rules. That being the legal position we find no infirmity in the judgment of the learned single judge. The appeal lacks merits and the same would stand dismissed.

Sd/-
K.S. RADHAKRISHNAN
Judge

Sd/-
ANTONY DOMINIC
Judge

25/05/2007
en

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